In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-250. See also No. 73-127

DONALD F. HAYNE,

Petitioner,

vs.

THE BOEING COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Court of Appeals For The Seventh Circuit.

BRIEF IN OPPOSITION

Petitioner's counsel has joined the petition for certiorari in this case from the Seventh Circuit (*Hayne*, No. 73-250) with two other completely unrelated cases from the Fourth Circuit (*Topik* v. *Catalyst Research Corp.*, No. 73-127), and the New York Court of Appeals (*S. Wallach Co.* v. *International Business Machines Corp.*, No. .....). The petition in No. 73-127 covers all three cases. The three complaints, by different plaintiffs against different defendants, alleged:

(1) an antitrust violation and a tort claim for blacklisting and invasion of privacy by reason of detective surveillance (*Hayne*),

(2) unfair allocation of the proceeds of a merger under Maryland law, and restriction on the growth of a corporation "by torts and breaches of contract" (Pet. No. 73-127, p. 5) (*Topik*), and

(3) disparagement of the quality of the plaintiff's work, constituting a slander (*Wallach*).

The only element common to the three cases is that the unsuccessful plaintiffs were represented by the same attorney. In the *Hayne* case the first count was dismissed because of failure in the complaint to state an antitrust claim; a directed verdict was entered on the second count at the close of plaintiff's evidence. In *Topik* and *Wallach* summary judgment or its New York equivalent was granted against the plaintiffs. On the merits, none of the cases present any federal question except the antitrust count in this case, *Hayne*.

The joint petition, while conceding that (p. 16) "Looked at in isolation, each of the companion petitions for certiorari would stand a good chance of being denied as involving matters not sufficiently consequential," asserts as questions common to all that the New York and federal summary judgment procedures and rules governing appellate control of trial courts, and the federal discovery rules, violate the Fourteenth and Fifth Amendments as applied generally in practice to plaintiffs in complex cases. But all that the records in these cases establish is that none of the plaintiffs even came close to establishing a substantive claim, and that therefore their cases were summarily disposed of. The fact that the above mentioned rules may have been applied adversely to some of these plaintiffs, as well

as to plaintiffs in a few other cases, does not demonstrate or justify an inference that the rules are generally unfair to plaintiffs in complex or any other types of cases.

In this case the Seventh Circuit affirmed the District Court on the antitrust count because the complaint failed to allege "that Boeing entered into an illegal agreement with any other firm (a claim that Boeing defamed the plaintiff is not tantamount to alleging an *agreement* with other firms) or that Boeing tried to monopolize any relevant market" (App. C3) (emphasis in original). The petition does not challenge this conclusion.

With respect to the second claim that Boeing had committed a tortious invasion of privacy by using private detectives to investigate him in connection with pending litigation in the Southern District of New York (see App. C2),* plaintiff contended that he should have access to the investigative reports in order to identify the detectives and the nature of the alleged surveillance. The reports were submitted to and examined by the trial judge, *in camera, at the request of the plaintiff* (App. below, p. 109). The trial judge "characterized them as 'routine credit reports'" (App. C4), which the plaintiff himself could have provided his counsel and which would not have been relevant to plaintiff's charges. As to this question the Court of Appeals stated (App. C4):

> "Since plaintiff made no request to have the reports made a part of the record on appeal, we necessarily must accept the trial judge's characterization as accurate. The failure to require production of such documents was not, in our opinion, reversible error."

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* *Costello* v. *Pan American Airways and the Boeing Company*, No. 3 Civ. 2845 (M.P.) (S.D.N.Y.).

Petitioner does not claim that any of these rulings present important questions. His argument "that the Federal Rules of Civil Procedure are unconstitutional because they confer too much discretion on trial judges" was, properly, summarily rejected by the Court of Appeals (App. C6-7).

Since the petition for certiorari presents no question remotely worthy of review by this Court, the petition should be denied.

Respectfully submitted,

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